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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1253

LYLE S. WOODCOCK,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

DANIEL KLUBOCK
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108
Attorney for Petitioner

ROBERT V. MULKERN
FUSARO & FUSARO
332 Main Street
Worcester, Massachusetts 01608
DANIEL F. FEATHERSTON, JR.
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108
Of Counsel

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INDEX

Page

OPINION OF THE COURT BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 13

1. **It Was A Denial Of Equal Protection Of The Law And Due Process Of Law To Deny Petitioner's Motion For Leave To File Motion To Dismiss And To Deny The Motion Which Demonstrated There Was Insufficient Evidence Before The Grand Jury.** 13

   A. *There Could Be No Constitutionally Valid Exercise Of Discretion Against Consideration Of This Motion.* 14

   B. *The Substantive Issue Sought To Be Raised By The Petitioner Has Constitutional Dimensions.* 15

   C. *There Was No Probab'e Cause For The Return Of The Indictment.* 19

2. **This Petitioner's Ensnarement Is Final Proof That Due Process Is Denied Whenever The "Mass Trial" Technique Is Utilized.** 21

3. **The Prosecution's Suppression Of Material Evidence Worked A Denial Of Due Process Of Law.** 27

4. **It Was A Denial Of Due Process Of Law To Consider Evidence Not Admitted Against Petitioner To Uphold His Conviction.** 32

5. **The Court Below Improperly Applied Ex Post Facto A Statute That Was Passed More Than A**

Page

Year After The Trial Had Been Completed In Order To Affirm Petitioner's Bribery Conviction. 34

CONCLUSION 38

TABLE OF CITATIONS

Cases

Addonizio v. *United States*, 10 Cr. L. 4181 25

Anderson v. *United States*, 273 Fed. 20 (8th Cir. 1921) 18

Attorney General v. *Pelletier*, 240 Mass. 264, 134 N.E. 407 16

Beck v. *Washington*, 365 U.S. 866, 82 S. Ct. 955 16

Blumenthal v. *United States*, 332 U.S. 539 (1947) 24, 25

Brady v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194 15, 30

Brady v. *United States*, 24 F. 2d 405 (8th Cir. 1924) 17

Bruton v. *United States*, 391 U.S. 123, 88 S. Ct. 1620 25

Calder v. *Bull*, 3 Dall. 386, 1 L. Ed. 648 36

Commonwealth v. *Benjamin*, 1971 Mass. Adv. Sh. 141, 266 N.E. 2d 662 ..... 34, 37

Commonwealth v. *DiStasio*, 297 Mass. 347, 8 N.E. 2d 923 ..... 34, 37

Commonwealth v. *Doherty*, 353 Mass. 197, 229 N.E. 2d 267 36

Commonwealth v. *Favulli*, 352 Mass. 95, 224 N.E. 2d 422 16

Commonwealth v. *French*, 1970 Mass. Adv. Sh. 619, 259 N.E. 2d 195 36

Commonwealth v. *Harris*, 231 Mass. 584, 121 N.E. 584 16

Commonwealth v. *Holley*, 3 Gray (69 Mass.) 458 ..... 16, 19

Commonwealth v. *Kurth*, 1971 Mass. Adv. Sh. 1117, 271 N.E. 2d 349 33

Commonwealth v. *Park*, 1 Gray (67 Mass.) 553 ..... 34, 35

Commonwealth v. *Perry*, 1970 Mass. Adv. Sh. 389, 256 N.E. 2d 745 37

Page

Commonwealth v. *Smith*, 417 Pa. 321, 208 A. 2d 219 (1965) 30

Commonwealth v. *Stasiun*, 349 Mass. 38, 206 N.E. 2d 672 ..... 33, 37

Connor v. *Picard*, 434 F. 2d 673 (1st Cir. 1970), *reversed on other grounds, sub nom. Picard* v. *Connor*, 404 U.S. 279, 92 S. Ct. 509 18

Costello v. *United States*, 350 U.S. 359, 76 S. Ct. 406 .. 15, 17

Cox v. *Vaught*, 52 F.2d 562 (10th Cir. 1931) 17

DeGolyer v. *Commonwealth*, 314 Mass. 626, 51 N.E. 2d 251 16

Dolan v. *Commonwealth*, 304 Mass. 325, 23 N.E. 2d 904 35

Douglas v. *Green*, 363 U.S. 192, 80 S. Ct. 1048 16

Enterprise Irr. Dist. v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 37 S. Ct. 318 18

Fields v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360 17, 33

Frank v. *Mangum*, 237 U.S. 309, 35 S. Ct. 582 16

Garner v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248 .... 17, 33

Giglio v. *United States*, —— U.S. ——, 92 S. Ct. 763 (1972) 30

Giles v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793 ..... 15, 30

Harrington v. *California*, 395 U.S. 250, 89 S. Ct. 1726 .. 18

Henry v. *Mississippi*, 379 U.S. 143, 85 S. Ct. 564 18

Holt v. *United States*, 218 U.S. 245, 31 S. Ct. 2 17

Hurtado v. *State of California*, 110 U.S. 516, 4 S. Ct. 111 16

In Re Lebowitch, Petitioner, 235 Mass. 357, 126 N.E. 831 14

Jones v. *Robbins*, 8 Gray (74 Mass.) 329 ..... 16, 19

Kennedy v. *Walker*, 337 U.S. 901, 69 S. Ct. 1046 16

Laughlin v. *United States*, 385 F.2d 287 (D.C. Cir. 1967) 18

Lawn v. *United States*, 355 U.S. 339, 78 S. Ct. 311 .. 15, 17

Murdick v. *United States*, 15 F.2d 965 (8th Cir. 1926) 17

Napue v. *Illinois*, 360 U.S. 264 (1959) 30

Opinion of the Justices, 232 Mass. 601, 123 N.E. 100 16

Page

People v. *Aranda*, 63 Cal. 2d 518, 47 Cal. Rptr. 353, 407 P.2d 265 (1965) 23
People v. *Crosby*, 25 Cal. Rep. 847, 375 P.2d 839 (1962) 18
People v. *Frost*, 120 N.Y.S. 2d 911, 204 Misc. 44 (1953) 18
Pierre v. *State of Louisiana*, 306 U.S. 354, 59 S. Ct. 536 16
Pinell v. *Supreme Court*, 42 Col. Rep. 676 (1965) 18
Regan v. *John J. Amara & Sons, Co.*, 348 Mass. 734, 205 N.E. 2d 705 26
Russell v. *United States*, 369 U.S. 749, 369 S. Ct. 1038 18
Sims v. *United States*, 405 F.2d 1381 (D.C. Cir. 1968) 23
State v. *Lawler*, 221 Wis. 423, 267 N.W. 65 (1936) 18
State v. *Parks*, Alaska Sup. Ct. 437 P.2d 642 (1968) 18
Thompson v. *Louisville*, 362 U.S. 194, 80 S. Ct. 625 ..... 17, 33
United States v. *Bozza*, 395 F.2d 206 (2d Cir. 1966) 24
United States v. *Branker*, 295 F.2d 886 (2d Cir. 1968) 23
United States v. *Buffalino*, 285 F.2d 408 (2d Cir. 1960) 24
United States v. *Costello*, 221 F.2d 668 (2d Cir .1956), *aff'd.*, 350 U.S. 359 18
United States v. *James*, 187 F. Supp. 439 (W.D. La. 1960), *reversed on other grounds*, 290 F.2d 866 (5th Cir. 1961) 18
Williams v. *Georgia*, 349 U.S. 375, 75 S. Ct. 814 18

Constitutions, Statutes, or Rules

Massachusetts Constitution, Pt. 1, Art. XII 4, 16
Massachusetts General Laws, c. 268, § 7 ..... 4, 34
Massachusetts General Laws, c. 274, § 1 ..... 4, 34
Massachusetts General Laws, c. 274, § 2 ..... 4, 34
Massachusetts General Laws, c. 277, § 47A 4, 14
Massachusetts General Laws, c. 278, § 2A 25
Massachusetts Rules of Superior Court, Rule 101A .. 6, 14
United States Constitution, Art. 1, § 9, cl. 3 ..... 3, 35
United States Constitution, Art. 1, § 10, cl. 1 ..... 3, 35

Page

United States Constitution, Sixth Amendment 3
United States Constitution, Fourteenth Amendment 3
28 U.S.C. § 1257(3) 2

Miscellaneous

Developments in the Law — Criminal Conspiracy, 72 HARV. L. REV. 920 (1959) 26
Kaufman, *The Appalachian Trial*, 44 J. Am. Jud. Soc. 53 (1960) 26
Note, *The Challenge of the Mass Trial*, 68 HARV. L. REV. 1046 (1955) 26
Panel Discussion, *The Problems of Long Criminal Trials*, 34 F.R.D. 155 (1963) 26
Proc. of Seminar on Protracted Cases, 21 F.R.D. 395 (1957) 26

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COMMONWEALTH OF MASSACHUSETTS,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Petitioner, Lyle S. Woodcock, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Judicial Court of Massachusetts, entered on November 4, 1971.

OPINION OF THE COURT BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, printed in Appendix A hereto [1], is reported in 1971 Mass. Adv. Sh. 1367, 275 N.E. 2d 33.

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[1] The Appendices are bound separately in the Joint Appendix of Petitioner and Liberty Loan Corporation.

JURISDICTION

The judgment of the court below was entered on November 4, 1971, and is printed in Appendix B hereto. A petition for rehearing, filed on November 18, 1971, was denied on November 23, 1971 (Appendices F, G). On January 24, 1972, Mr. Justice Brennan extended the time for filing this petition to and including April 2, 1972 (Appendix H). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since Petitioner had specially set up and claimed certain rights under the Constitution of the United States.

QUESTIONS PRESENTED[2]

1. (a) Was Petitioner denied due process of law and equal protection of the laws by the denial of his Motion For Leave To File Motion To Dismiss on the ground that it was untimely, when the motion was filed at the earliest possible moment, and could not have been filed earlier only because the information on which it was based was withheld by the prosecution?

(b) Is it an error of constitutional dimension that the grand jury here returned indictments on insufficient evidence?

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[2] To avoid burdening the Court with unnecessary duplication, Petitioner adopts and incorporates herein the questions presented in the Petitions for Certiorari filed herein by Beneficial Finance Co. and Household Finance Company which argue that Petitioners were denied equal protection of the laws and due process of law because of the manner in which the indictments were procured from the grand jury. Petitioner duly raised these issues in a pre-trial motion to dismiss and other pleadings and exceptions, preserved them on appeal in his assignments of error, specifically preserved them by adopting, on page 4 of his pre-trial brief in the court below the arguments pertaining thereto by the other defendants, and the Massachusetts Supreme Judicial Court specifically recognized that this Petitioner had duly preserved and presented the questions and expressly rejected these federal constitutional claims. See pages A-5 to A-22, A-29 to A-33 of Joint Appendix filed herewith.

2. Is this record of Petitioner's ensnarement final proof that the "mass trial" technique is fundamentally incompatible with due process of law?

3. Did the prosecution's suppression of material evidence deny Petitioner due process of law?

4. Was it a denial of due process of law for the court below to affirm the denial of Petitioner's motion for a directed verdict by resorting to evidence not admitted against Petitioner?

5. When Petitioner's bribery conviction could be affirmed only by applying a statute passed a year and a half after trial, was it a denial of due process and the application of law ex post facto?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Art. 1, §9, cl. 3

No Bill of Attainder or ex post facto Law shall be passed.

Art. 1, §10, cl. 1

... No State Law shall ... pass any ... ex post facto ....

Amendments, Art. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and ... to be confronted with the witnesses against him ...

Amendments, Art. XIV, §1

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Constitution, Pt. 1, Art. XII

No subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally, described to him . . .

Mass. Gen. Laws (Ter. Ed.)

c. 268, § 7. Whoever corruptly gives, offers or promises to a legislative, executive, judicial, county or municipal officer, after his election or appointment, either before or after he has qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act, vote or opinion, decision or judgment upon any matter, question, cause or proceeding which may be then pending, or which may by law come or be brought before him in his official capacity, or as a consideration for any speech, work or service in connection therewith, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than three thousand dollars and imprisonment in jail for not more than one year.

c. 274, §1 A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

c. 274, §2 Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal.

c. 277, §47A The pleadings in criminal proceedings shall be the indictment or complaint, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers, challenges to the array and to the manner of selection of grand or traverse jurors, and motions

to quash are hereby abolished, and any defenses and objections, which could have been raised before trial by one or more of them prior to October fourth, nineteen hundred and sixty-five, shall be raised only by motion to dismiss or by a motion to grant appropriate relief, as hereinafter provided.

Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or complaint, other than a failure to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. Such motion shall include all such defenses and objections then available to the defendant and shall set out such defenses in separately numbered paragraphs with particularity. Any facts relied upon in support of any of said defenses shall be stated in an affidavit attached to said motion. Failure to present any such defense or objection shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

The motion shall be made before the plea is entered, but may either by a general court rule or by order of the justice be made within a reasonable time thereafter. Upon an appeal to the superior court from a conviction in a district court, any motion permitted under this section may be filed in the superior court within ten days after the entry of the appeal, or within such reasonable further time as the court may allow by special order or general rule.

A motion before trial raising such defenses or objections shall be determined before trial, unless the court orders that it be deferred for determination at the trial of the general issue.

If a motion is determined adversely to the defendant, he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or complaint, it may order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or complaint. Nothing in this section shall be deemed to affect the provisions of any statute relating to periods of limitations. Added St. 1965, c. 617, § 1, as amended St. 1965, c. 756, § 1.

Rules of the Superior Court

Rule 101A

PLEA OF NOT GUILTY

(Applicable to criminal cases)

A plea of not guilty, whether voluntarily made by the defendant or entered by order of the Court, shall not be deemed to be a waiver of matters in bar or abatement or an admission of the validity of the indictment or complaint. A defendant at the time of the entry of such plea, or within ten days thereafter or within such further time as the Court may order, may file such motions and other pleadings relating to matters in bar or abatement or to the validity of the indictment or complaint as he may desire without at any time retracting the plea of not guilty.

Lack of jurisdiction or the failure of the indictment or complaint to charge an offense may be raised at any time during the pendency of the proceedings.

STATEMENT OF THE CASE

In 1964, 129 indictments were returned by a Special Grand Jury charging that various members of the small loans industry had conspired to bribe and had offered or given bribes to certain public officials, against whom indictments were also returned for conspiracy to solicit and for soliciting or accepting bribes. Petitioner Lyle S. Woodcock,[3] a vice-president of Liberty Loan Corporation,[4] was named as a defendant in five indictments. One of the indictments was dismissed before trial, and Petitioner was found not guilty on a second, which was the subject of a second trial. The three indictments naming Petitioner, which are the subject of this petition, were joined for trial which began on July 17, 1967 with 45 other indictments involving 72 separate counts, against 14 other defendants. Two of the defendants were public officials charged in 17 indictments with conspiracy to solicit bribes and soliciting and accepting bribes. The remaining defendants were charged with conspiracy to bribe and offering or giving bribes to those two officials.

During the trial, hundreds of items of documentary and testimonial evidence were limited to particular defendants. The limitations announced to the jurors at various times included 50 different combinations of individual and corporate defendants. After finding that sufficient evidence of conspiracy existed, the court granted in many particulars the Commonwealth's motions to change the limita-

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[3] Hereinafter referred to as "Woodcock."
[4] Hereinafter referred to as "Liberty."

tions on 48 items of evidence. (Appendix C, D). On November 2, 1968, the court announced to the jury nearly 700 extensions as to the 48 items, referring only generally to the particular items of evidence which had been introduced over the preceding 72 trial days.

An example of one of those instructions, which referred to testimony given on October 3, was:

> "Item 46 is testimony by Heath that he was at the State House one day and at a closed door to a room in which the Rate Board was holding an executive session, that it was the day that the Board made a decision, that he had a talk with Glynn there about what was going on, and he testified to what he said and what Glynn said, and testified to how long the public hearing was, and he testified about someone reading a statement at that public hearing. That is admitted as to the additional defendants Barber, Pratt, Farrell and Woodcock, Beneficial, Household and Liberty — excuse me. I will start over again. That is admitted as to the defendant Barber, Pratt, Farrell and Woodcock on one conspiracy indictment — that is 11900, charging conspiracy to offer a bribe to Hanley; and as to those same four defendants, Barber, Pratt, Farrell and Woodcock, that item was admitted on Counts 1 of each of four different indictments, that Count 1 in these indictments charging a different one of these persons with offering a bribe to Hanley. In addition, this item has been admitted as to Beneficial, Household and Liberty on each of the two conspiracy indictments, 11900 relating to Hanley, 11910 relating to Garfinkle. This item also has been admitted as to Beneficial as to both counts of 11901, as to Household as to both counts of 11905, and as to Liberty as to both counts of 11997. Now, in these last three indictments there are two

counts in each indictment. One alleges the offering of a bribe to Hanley, the other alleges offering of a bribe to Garfinkle."

(I Tr. 5237-5238).

During the recital of those limitations, which lasted 90 minutes, there was considerable confusion, and even error. For example, the court had denied the Commonwealth's motion to admit Item 32 against Liberty on the substantive indictments, but told the jury that it was admitted against Liberty on Count 1 of the substantive indictment. (I Tr. 5228).

Of the 48 items, only three were originally admitted against Woodcock (and none against Liberty), and 21 were never admitted against Woodcock (23 were never admitted against Liberty). See Figure 1, *infra* p. 39.

Prior to trial, and on several occasions during trial, Petitioner objected to the joining of his case with so many others, and moved for severance. Petitioner constantly alleged that he could not receive a constitutionally fair trial. These motions were all denied, and their denials affirmed by the Massachusetts Supreme Judicial Court.[5]

Prior to trial, Petitioner requested that he be provided with the minutes of the Grand Jury, which request was denied. However, on September 26, 1966, after trial had run for two months, the prosecution provided Petitioner with a portion of the Grand Jury testimony of William F.

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[5] The constitutional issue, presented in Question 2, was raised and argued by Petitioner and Liberty in the trial court by several motions for severance (R.* 1526, 1622, 1629, 1672, 1681, 1738; I. Tr. 689, 847, 1588, 3987, 4853, 5394), and in the court below. Consolidated Brief of the Defendants, at pages 111 to 145. The court below considered and rejected Petitioners' contentions. Appendix A, pages A-22 to A-27, A-121 to A-124.

* "R." refers to the Summary of Record below.
"I. Tr." refers to the transcript of the first trial.

Heath, the principal Commonwealth witness. Petitioner thereupon, on September 28, 1966, filed a Motion For Leave To File Motion To Dismiss and an accompanying Motion To Dismiss, followed the next day by a Substitute Motion To Dismiss. These motions alleged, denial of due process in that there had been insufficient evidence for the grand jury to have returned the indictments against Petitioner.

The court denied Petitioner leave to file the Motion To Dismiss, and the Massachusetts Supreme Judicial Court affirmed.[6]

During the trial, the only incriminating evidence against Petitioner consisted of the testimony of William F. Heath.[7] Heath stated that he attended a meeting in New York on October 17, 1962, at which various members of the small loans industry were present. The meeting had been called for two legitimate reasons, but during the course of the meeting someone from another company brought up the possibility of bribing the small loans Rate Board for $75,000. This was considered preposterous by most people at the meeting. Heath then suggested it could be done for $25,000. Heath testified that Woodcock then said "in substance" and "to the best of [Heath's] present memory," " 'at the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions.' " Barber of Household Finance was chosen as the

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[6] The constitutional issues, presented in Question 1., were raised and argued by Petitioner and Liberty in the trial court and in the court below. Consolidated Brief of the Defendants on Pre-Trial Errors, at pages 5 to 16; Defendants' Reply Brief, at pages 2-6. The constitutional issues were rejected by the court below. Appendix A, pages A-33 to A-35.

[7] Heath, an employee of another loan company, was alleged to be a co-conspirator, but not a defendant, as was his company.

person to handle the offer to Hanley. Heath's testimony as to that one sentence he said was spoken by Woodcock was the entire case against Woodcock.

Two of the persons present said they had no authority to commit their companies. Heath said he and two others had no authority to commit their companies. There was no evidence *admitted against Woodcock* as to the authority of any of the others. There was no other evidence concerning any words or acts of Woodcock (or anyone else from Liberty).

The Massachusetts Supreme Judicial Court upheld the denials of Woodcock's motions for directed verdicts, unconstitutionally applying evidence not admitted against Woodcock as to the authority of other defendants,[8] and unconstitutionally and *sub silentio* applying *ex post facto* a new statute, passed, a year and a half after trial, which eliminated a distinction between principals and accessories before the fact in felony cases, thereby unconstitutionally making conspiracy sufficient evidence of substantive guilt for the first time in Massachusetts.[9]

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[8] Motions for directed verdicts on the conspiracy indictments were filed in the trial court, and argued in the court below. Consolidated Brief of the Defendants, at pages 25 to 52. Petitioner's contentions were rejected by the court below. Appendix A, pages A-57 to A-58.

The specific constitutional issue, presented in Question 4., arose only through the opinion of the court below unexpectedly upholding the conspiracy on the basis of evidence not admitted against Petitioner or Liberty. That constitutional issue was raised in a petition for rehearing (Appendix F), which was considered by the court below and denied (Appendix G) as to Petitioner and Liberty.

[9] Motions for directed verdicts on the substantive indictments were filed in the trial court, and argued in the court below. Consolidated Brief of the Defendants, at pages 52 to 59. Petitioners' contentions were rejected by the court below. Appendix A, pages A-135 to A-136. The constitutional issues, presented in Question 5., relate to the fact that the court below, unexpectedly, failed to follow applicable Massachusetts law, and applied new law retroactively. These constitutional issues were raised in a petition for rehearing (Appendix F), which was considered by the court below and denied (Appendix G) as to Petitioner and Liberty.

The jury returned verdicts of guilty on all three indictments, finding that Petitioner conspired to bribe and offered to bribe the two public officials. He was sentenced to serve 2 1/2 to 3 years in prison on the substantive indictment, and one year in the house of correction on and after the prison sentence is served on the conspiracy indictment. Execution of the sentences has been stayed pending this Court's action.

During the second trial, at which Petitioner was found not guilty, the Commonwealth produced additional grand jury testimony which contained material which was exculpatory of the charges in the first trial, showing that Heath had a prior grudge against Woodcock, despite his testimony at the first trial that he was on friendly terms with all Liberty personnel. More important, however, were two other items. The first showed that the prosecutor had misrepresented the facts when he warned defense counsel in the first trial that if he cross-examined Heath on apparently exculpatory grand jury testimony, he would bring out evidence of other criminality. At the second trial it was learned that the evidence was exculpatory and no other criminality would have been elicited had Heath been examined on it. The grand jury testimony also showed, along with other evidence, that the prosecution had intentionally suppressed evidence of Heath's expense accounts, according to a "deal" made with Heath, which indicated that there was no important incriminating restaurant meeting prior to the Hotel Commodore meeting such as Heath had testified to during the first trial.

Upon receiving the foregoing material, Petitioner and Liberty filed a Motion For New Trial, which was denied after hearing (Appendix E) and the denial affirmed by the Massachusetts Supreme Judicial Court.[10]

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[10] The constitutional issue, presented in Question 3., was raised and argued by Petitioner and Liberty in the trial court by a motion for a new

REASONS FOR GRANTING THE WRIT

1. It Was A Denial Of Equal Protection Of The Law And Due Process Of Law To Deny Petitioner's Motion For Leave To File Motion To Dismiss And To Deny The Motion Which Demonstrated There Was Insufficient Evidence Before The Grand Jury.

Two days after receiving the relevant grand jury testimony during the course of trial, Petitioner filed a Motion For Leave To File Motion To Dismiss, and an appended Motion To Dismiss (the next day replaced by a Substitute Motion To Dismiss). The motions alleged that the recently received grand jury testimony demonstrated that there was insufficient evidence before the grand jury to warrant the return of these indictments. (It is important to note that Petitioner had requested, and been denied, the grand jury testimony before trial.)

The trial court denied Petitioner leave to file, and the Massachusetts Supreme Judicial Court affirmed, holding:[11]

1) "Return of an indictment on insufficient evidence is not an error of constitutional dimensions such as to compel a judge to consider an untimely motion."

2) The motion was untimely because not filed before trial, despite the fact that Petitioner did not receive the transcripts until two days before the motion was filed.

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trial (R. 1960). It was argued to the court below, Consolidated Brief of the Defendants, at pages 59 to 92. The court below considered and rejected Petitioners' contentions. Appendix A, pages A-127 to A-135. The relevant opinion of the trial court is printed in Appendix E, pages E-1 to E-38.

[11] Appendix A, at pages A-33 to A-35.

3) The trial judge had discretion to consider the motion to dismiss, but did not abuse his discretion in refusing to do so since Petitioner made "no showing of any reason sufficiently strong or impelling to require . . . [him] to exercise [his] discretion" to permit Petitioner to file his motion to dismiss.

A. There Could Be No Constitutionally Valid Exercise Of Discretion Against Consideration Of This Motion

Under Massachusetts practice, Petitioner had the absolute right to file a motion to dismiss within ten days after pleading not guilty.[12] In this case, Petitioner did not file such a motion (on the ground relevant here) before trial commenced because he did not have the facts on which to base it. Petitioner did, however, seek to learn the facts by filing a timely motion for the production of the grand jury minutes, which motion was opposed by the Commonwealth and denied by the trial judge. Petitioner was thereby prevented from learning the facts on which his motion to dismiss was based until September 26, 1966, when the Commonwealth provided the grand jury minutes. The Commonwealth, by withholding the information until after the time for filing a motion to dismiss had run, effectively prevented Petitioner from presenting the issue to the court.

This practice of the Commonwealth amounted to the withholding of exculpatory evidence to the prejudice of Petitioner. The effect of the holding below is to allow a prosecutor to withhold exculpatory evidence until trial begins, secure that a motion to dismiss based upon such

[12] In the past, entry of a plea was considered a waiver of the right to challenge the indictment. *In Re Lebowitch, Petitioner*, 235 Mass. 357, 126 N.E. 831. However, now, by statute (G.L. c. 277, §47A) and Rule (Rule 101A of the Superior Court), the court may relieve a defendant of the presumption of waiver. Neither the Commonwealth nor the courts below charged the Petitioner with waiver.

evidence would be ruled untimely and the evidence would lose its exculpatory value. This is a clear evasion of the constitutional edict of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, and *Giles* v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793, and constituted a denial of due process of law.

In addition, it is a denial of equal protection of the law in that it distinguishes on an irrational basis between those defendants who have early access to grand jury minutes and those whose access to the minutes comes later. While there might be reason for giving some defendants such access later than others, there is no reason for denying the latter the same right to file a motion to dismiss as that granted to the former.

It is certainly reasonable to make procedural rules that require motions to be filed within reasonable periods of time. But when those rules are arbitrary, or are used to prevent a diligent defendant from exercising rights granted to others, they cannot stand.

Here, it is conceded that Petitioner in no way waived his rights or lacked diligence. He filed his motion within two days of receiving the information. He was prevented from earlier filing only by the Commonwealth's withholding of the evidence. That can not be considered a reasonable distinction, or a reasonable case in which to exercise discretion against consideration of a motion.

B. *The Substantive Issue Sought To Be Raised By The Petitioner Has Constitutional Dimensions*

The court below recognized that the trial judge would have been obliged to allow the filing of the motion to dismiss if the substantive issue that Petitioner sought to raise had been one of constitutional dimensions. However, the court found that it was not, citing *Costello* v. *United States*, 350 U.S. 359, 363-364, 76 S.Ct. 406, 408-409, and *Lawn* v. *United*

States, 355 U.S. 339, 349-350, 78 S.Ct. 311, 317-318. Those cases do not determine the issue.

Article XII of the Declaration of Rights of the Massachusetts Constitution has been held to require that no person be held to answer for a felony unless upon indictment by a grand jury. *Commonwealth* v. *Holley*, 3 Gray (69 Mass.) 458, 459; *Jones* v. *Robbins*, 8 Gray (74 Mass.) 329, 344; *DeGiolger* v. *Commonwealth*, 314 Mass. 626, 627-629, 51 N.E.2d 251, 252-253, and cases cited therein. This Court has held that while the Fourteenth Amendment does not necessarily require state prosecutions to be instituted by indictments of grand juries, a state that does provide that right must also provide for fair grand juries. *Hurtado* v. *State of California*, 110 U.S. 516, 4 S.Ct. 111; *Kennedy* v. *Walker*, 337 U.S. 901, 69 S.Ct. 1046; *Pierre* v. *State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536 (Negroes cannot be excluded); *Beck* v. *Washington*, 365 U.S. 866, 82 S.Ct. 955 (certiorari granted to determine whether a state, having once resorted to a grand jury, is required to furnish one free from substantive bias. The Court found it unnecessary to determine the issue ultimately, however. 369 U.S. 541, 546, 82 S. Ct. 958.)

In analogous areas, the Court has held that state appellate review must be fair if there is any at all. *E.g.*, *Douglas* v. *Green*, 363 U.S. 192, 80 S.Ct. 1048; *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S.Ct. 582, 587.

In Massachusetts a conviction can be reversed because of unfair procedures in the grand jury process. *Commonwealth* v. *Harris*, 231 Mass. 584, 121 N.E. 584. See also *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420; *Opinion of the Justices*, 232 Mass. 601, 604, 123 N.E. 100, 101; *Commonwealth* v. *Farulli*, 352 Mass. 95, 116-126, 224 N.E.2d 422, (dissenting opinion). The question here is one of whether there is a constitutional requirement that States provide substantive as well as

procedural due process. It is well established in other areas that they must. For example, *Thompson* v. *Louisville*, 362 U.S. 194, 80 S.Ct. 625; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248; and *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S.Ct. 360, held that a trial by jury was not enough; there must also be sufficient evidence before that jury to justify its decision.

The precise issue presented here has not yet been met squarely by this Court. *Holt* v. *United States*, 218 U.S. 245, 31 S.Ct. 2; *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406; and *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311, decided only that "tainted" evidence before the grand jury was not reason to quash an indictment. (*Holt*—a confession made incompetent by the circumstances surrounding it; *Costello*—hearsay; *Lawn*—illegally seized evidence.) While it is true that the Court in dictum in those cases seemed to be making a broader rule, that rule has not been established, and clarification is needed. As the concurring opinion in the *Costello* case stated:

> "I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. at 364; 76 S.Ct. at 409.

A number of other cases support that view.[12a]

Since it has long been held that the constitutional requirement is that a grand jury return an indictment not

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[12a] *Cox* v. *Vaught*, 52 F.2d 562 (10th Cir. 1931); *Brady* v. *United States*, 24 F.2d 405 (8th Cir. 1924); *Murdick* v. *United States*, 15

based on prejudice, whim, or caprice, but only on probable cause, the court below, in stating that Petitioners raised no issue "of constitutional dimensions *such as* to compel a judge to consider an untimely motion," (emphasis added) must have been holding that even when there is a clear violation of the constitutional requirement of probable cause, there need be no remedy. This has been allowed in cases where the error is harmless. *Harrington* v. *California*, 395 U.S. 250, 89 S.Ct. 1726. But here the error is clearly prejudicial if Petitioner's allegations are true, and the interest of the Commonwealth in the procedural barring of this claim is minimal at best.[13]

F.2d 965 (8th Cir. 1926); *Anderson* v. *United States*, 273 Fed. 20 (8th Cir. 1921); *United States* v. *James*, 187 F.Supp. 439 (W.D. La. 1960), *reversed on other grounds*, 290 F.2d 866 (5th Cir. 1961); *State* v. *Parks*, Alaska Sup. Ct. 437 P.2d 642 (1968); *People* v. *Crosby*, 25 Cal. Rep. 847, 375 P.2d 839 (1962); *Pinell* v. *Supreme Court*, 42 Col. Rep. 676 (1965); *People* v. *Frost*, 120 N.Y.S.2d 911, 204 Misc. 44 (1953); *State* v. *Lawler*, 221 Wis. 423, 267 N.W. 65 (1936). *See Laughlin* v. *United States*, 385 F.2d 287, 291 (D.C. Cir. 1967); *United States* v. *Costello*, 221 F.2d 668, 677 (2d Cir. 1956), *aff'd*, 350 U.S. 359. And in *Russell* v. *United States*, 369 U.S. 749, 770, 369 S.Ct. 1038, 1050, this Court pointed out that it was unacceptable that a defendant ". . . be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." See also *Connor* v. *Picard*, 434 F.2d 673 (1st Cir. 1970), *reversed on other grounds, sub nom. Picard* v. *Connor*, 404 U.S. 270, 92 S.Ct. 509.

[13] The adequate and independent state ground doctrine presents no barrier to this Court's power of review over this issue. The state procedural ground relied upon by the court below was, by its express terms (A-34), so "interwoven" with the adverse determination of Petitioner's federal claim that the state ground cannot be an independent matter. *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 321. Moreover, the lower court's recognition that this issue could be raised at a late stage and determined as a matter of discretion empowers this Court to review the issue under its holding in *Williams* v. *Georgia*, 349 U.S. 375, 383, 75 S. Ct. 814, 819. In any event, since no legitimate state interest can be served by insistence on compliance with the state procedural rule—an impossible task for Petitioner under the facts herein—the state ground is inadequate. *Henry* v. *Mississippi*, 379 U.S. 143, 85 S.Ct. 564.

C. *There Was No Probable Cause For The Return Of The Indictment*

The standard on which a Massachusetts grand jury is to return an indictment is the familiar one of probable cause. *Commonwealth* v. *Holly*, 3 Gray (69 Mass.) 458, 459; *Jones* v. *Robbins*, 8 Gray (74 Mass.) 329, 344. No more difficulty is presented in reviewing any such case than in those cases raising issues of probable cause to arrest or search.

In this case, however, the court below noted that assuming "that the portion of the transcript here submitted was insufficient to sustain the indictments, the Stipulation of the parties "does not state that there was no other evidence before the Grand Jury bearing on these indictments...." The Stipulation does say that this was all the relevant evidence "To the best of the Commonwealth's knowledge ..." At the hearing on the motion, the Commonwealth was invited to add any evidence it thought relevant. To this day, the Commonwealth has not claimed that there was any. If such evidence exists, the petitioners waive any objections they might have to its submission as an appendix to the Commonwealth's Brief herein.

It seems patent that here the court below was taking unfair advantage of petitioners' good faith attempt to ease the burden of the courts by limiting the record as much as possible, which effort was assisted by the trial counsel for Commonwealth. The Commonwealth's trial counsel never indicated—either at oral argument or in their Memorandum of Law—that they relied on any inference that other evidence might exist. The device of implying that the prosecution has other evidence is unfair, dishonest and a violation of due process of law.

The evidence on which the grand jury returned the indictments against petitioners is contained in 25 pages of transcript. It shows that Woodcock was one of 8 or 9 men from

various loan companies who met in the Hotel Commodore in New York in October, 1962, to discuss two legitimate matters: the feasibility of forming a new trade association in Massachusetts, and the gathering of statistics to present a case at the forthcoming rate board hearing. That during the meeting, Farrell (of Beneficial Management) raised the issue of whether they should "do anything about the rate board to perhaps insure a favorable result." That when Glynn (also of Beneficial) suggested that it would cost fifty to seventy-five thousand dollars, "statements were made that they were not going to participate in a program of that size." Heath (of American Investment) suggested that it would only co $25,000.00, at "which everybody was in agreement . . . there was complete agreement that the figure of twenty-five was all right." Barber (of Household Finance) was chosen to handle the deal.

Heath also stated that: "a chain man like [Heath] always had to say: 'In my opinion, I believe we will participate, but I will naturally have to clear the home office and get final approval,' and no one in my position ever had the authority to commit the company at that particular moment."

That testimony can only indicate that the men at the meeting agreed to recommend a particular plan to their companies. The conspiracy charged could only have been entered into after the "home office" of the companies had given final approval. There was considerable evidence indicating that indeed the home offices of some companies did give final approval, and that they entered into a conspiracy. *But not one word was mentioned at any time thereafter about Woodcock, Liberty, or any other Liberty employee.* The only inference that could reasonably be drawn is that Liberty did not give final approval, and that they, the Petitioners, did not ultimately join the conspiracy.

If A and B are heard to ask C to join with them to rob a bank, and C says "I'll have to let you know tomorrow," there is no probable cause to arrest C, even after the bank has been robbed, unless there is further evidence that C did or said something to indicate he had joined the conspiracy. This is no different. If Woodcock could not have been arrested on that testimony consistent with Fourth Amendment requirements, then he could not be put to trial on it either.

2. This Petitioner's Ensnarement Is Final Proof That Due Process Is Denied Whenever The "Mass Trial" Technique Is Utilized.

In this trial, which lasted from July 18, 1966, to December 18, 1966, which joined together 15 defendants in 48 indictments having 77 counts, but in which Petitioner was a defendant in only 3 indictments having 4 counts, in which the transcript of evidence consists of 103 volumes containing more than 7,500 pages, only one sentence, testified to by only one witness, was incriminating to Petitioner. And that sentence was repeated only "in substance" and to the "best of [the witness's] present memory" some four years after it had allegedly been uttered, and the witness had not ascribed so much as one word to Petitioner in several appearances before the Crime Commission and the grand jury.

The witness, William F. Heath, named as a co-conspirator but not a defendant, testified from September 21, 1966, to November 4, 1966. His testimony covers some 2,000 pages of transcript. The only part of his testimony that even concerned Petitioner was contained in 101 pages of direct testimony (and 67 pages of cross-examination) describing a meeting at the Hotel Commodore in New York on October

17, 1962, at which the conspiracy is alleged to have been formed. At that meeting, which for the most part concerned legitimate topics, Petitioner is mentioned as saying only three things, only one of which was incriminating. He is alleged to have said, "at the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions." This witness had complete power over every defendant. He exonerated some defendants by saying that they said they did not have authority and would report to their companies.

As an example of how slim was his evidence, he could have exonerated Petitioner completely by making the sentence read: "perhaps we'll have no choice" or "perhaps we'd have no choice" instead of "perhaps we have no choice." And even he admitted that he was not reporting verbatim, but only "in substance," "to the best of [his] present memory."

With the exception of his testimony about that meeting, Heath's testimony concerned only the many activities and statements of the many co-defendants, both before and after the meeting, some of which was, and some of which was not, ultimately admitted against Petitioner. As a result of a finding of conspiracy, the trial judge, on motion of the Government, changed original limitations on 48 items of evidence, 27 of which he admitted against Petitioner (only 24 against Liberty), but 21 of which he did not admit against Petitioner. (See Appendices C, D) And some of the 27 items were admitted only on certain counts or certain indictments. Of the 48 items, only three had been originally admitted against Petitioner (none against Liberty). Figure 1, *infra*, p. 39 contains a chart showing the original and extended limitations. Of course, there were many volumes of additional

testimony originally admitted against other defendants which were never admitted against Petitioner.[14] The chart shows only those items on which the original limitations were extended. While even a most careful and skillful jurist, as was the trial judge here, armed with charts, transcripts, and notes, had difficulty in keeping the evidence sorted "into separate intellectual boxes," *People* v. *Aranda*, 63 Cal.2d 518, 529, 47 Cal. Rptr. 353, 359-60, 407 P.2d 265, 271-72 (1965), it would be a mere "willing suspension of disbelief," in Coleridge's phrase, to expect such impossible performance from the lay jurors. In the case at bar, some testimony was admitted only as to individual defendants; some as to all corporate defendants; some as to only some corporate defendants; some on only one conspiracy indictment; some on one conspiracy indictment and one count of a substantive indictment; others on two conspiracy indictments, and one count of a substantive indictment; still others on both conspiracy and both substantive indictments —all as to some but not all of the defendants. Rather than require the jury to apprehend these minutiae and perform a realistically impossible mental gymnastic—which only a computer might perform—of ignoring certain damaging evidence with a pageantry of varying limitations and yet objectively determine the guilt or innocence of the defendants, the court would have adverted the prejudice by granting severance. *Sims* v. *United States*, 405 F.2d 1381 (D.C. Cir. 1968); *United States* v. *Branker*, 395 F.2d 886-

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[14] For example, there was considerable testimony by Heath concerning a luncheon meeting at Purcell's restaurant at which Heath, Glynn, and Pratt discussed how they would bring up the subject of trying to bribe the Rate Board at the forthcoming Hotel Commodore meeting. I Tr. 3528-3531, 3563-3577, 3581-3582. This topic is treated further *infra*, pp. 29, 32.

Another example is Heath's testimony that Glynn had told him that Hanley and another had gone to Washington, "at which time the package was delivered." (I Tr. 3929-3931.)

87 (2d Cir. 1968); *United States* v. *Bozza*, 395 F.2d 206, 215 (2d Cir. 1966); *United States* v. *Buffalino*, 285 F.2d 408, 416 (2d Cir. 1960). As this Court stated in *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947): "[E]ven at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely." The enclosed chart (Figure 1; Appendices C and D) showing the chameleonic limitations put on the evidence by the court, demonstrates the charade of pretending that the jury is a computer.

Any presumption that the jurors could keep straight the limitations on evidence must totally vanish when one considers the fact that the Commonwealth was allowed to argue the case to the jury as though there were no limitations on the evidence at all. (1 Tr. 7128, 7141.) The confusion that must certainly have been in the jurors' minds was immeasurably compounded by that procedure.[15] Yet, the court below held:

> "... [I]t is highly improbable that the jury could or did remember all the limitations on all the evidence, but to return a guilty verdict against a defendant it was necessary that they remember only the limitations on that part of the evidence which was critical to sustain a conviction against that defendant .... There is no indication that the jury could or did not comprehend the limitations. 'We see no reason to depart from our rule that jurors are expected to follow instructions

[15] Petitioner took exception to the refusal of the court to instruct the jurors that if they were uncertain as to what evidence might be considered against a defendant, they must return a verdict of not guilty against that defendant.

to disregard matters withdrawn from their consideration.'" Appendix A, page A-123.

The court below said in effect that the verdicts of guilty demonstrated that the jury had been sufficiently inclusive, and that the court would assume that it had been properly exclusive, though recognizing it was highly improbable that it could have been so. This does not comply with the requirement that the jury treat each defendant in a joint prosecution as if separately tried, considering "only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States*, 391 U.S. 123, 131 n. 6, 88 S.Ct. 1620, 1625 n. 6, citing *Blumenthal* v. *United States*, 332 U.S. 539, 559-560, 68 S.Ct. 248, 257.

Petitioner, like many before him, fell victim to the mass conspiracy trial.[16]

Of the testimony admitted against Petitioner, probably 99% consisted of the acts and statements of co-conspirators, and co-defendants who were not even co-conspirators. Yet Petitioner could not even call one of them to the witness stand to testify in his behalf, or even to claim the privilege against self-incrimination. And none of them voluntarily testified. Enmeshed in this net, Petitioner was entirely at the mercy of Heath with no possibility of assailing his testimony. See *Addonizio* v. *United States*, 10 Cr. L. 4181, 4182 (Mr. Justice Douglas, dissenting).[17]

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[16] It is noteworthy that since this trial Massachusetts has outlawed the joint trial of conspiracy and substantive indictments. G.L. (Ter. Ed.) c. 278, §2A.

[17] One particularly egregious piece of evidence testified to by Heath was that Glynn told Heath, that Barber had told Glynn that Barber had told McDermott (neither a co-conspirator nor a co-defendant) that Hanley had told Barber that Hanley wanted another $10,000, and that Glynn had told Heath that Barber had told Glynn that McDermott told Barber that he would not donate it. (1 Tr. 3917-3920.) (Admitted against Petitioner on Indictment Nos. 11,900, 11,910, and Count 2 of 12,032.)

Worse still, Petitioner was at odds with his co-defendants as to his defense. At one point in cross-examining Heath, the trial court excluded an important line of questioning upon objection of the co-defendants, not the Government. (I Tr. 5379.) While the question called for hearsay, it would have been admissible in the absence of objection. *Regan* v. *John J. Amara & Sons Co.*, 348 Mass. 734, 737, 205 N.E. 2d 705, 707.

Perhaps the most important demonstration of the problem of contradictory defenses occurred when the prosecutor warned defendant not to proceed with a particular line of questioning since it would open other areas of criminality. It was later discovered by Petitioner, that this criminality was not of Petitioner, but of his co-defendants. The prosecutor was clearly trying to prevent a mistrial as to other defendants.[18]

In addition, Petitioner was prejudiced by actions of his co-defendants, which he did not have the power to prevent.[19]

Many authorities have criticized the unfairness of multi-defendant conspiracy trials.[20] This trial demonstrates the validity of their criticisms, and resulted in the denial of Petitioner's constitutional right to a fair trial on evidence presented against him, by witnesses confronting him, and free from the prejudice engendered by the acts and statements of others.

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[18] This point is treated more fully *infra*, pp. 27, 32.

[19] To cite only one example, counsel for one co-defendant stated in cross-examining Heath, "Let's take another look at this little Appalachia in New York, Mr. Heath . . . ." (I Tr. 4806.)

[20] Note, *The Challenge of the Mass Trial*, 68 HARV. L. REV. 1046 (1955); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Panel Discussion, *The Problems of Long Criminal Trials*, 34 F.R.D. 155 (1963); *Proc. of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957); Kaufman, *The Appalachian Trial*, 44 J. Am. Jud. Soc. 53 (1960).

3. The Prosecution's Suppression Of Material Evidence Worked A Denial Of Due Process Of Law.

During the trial the prosecution provided the defendants with certain portions of the grand jury and Crime Commission testimony of the witness Heath. He was, essentially, the prosecution's whole case, as was admitted in final argument: "... without Mr. Heath there is no question that you have no case." I Tr. 7127. Defense counsel specifically requested the remaining Heath transcripts, but the prosecution repeatedly said that what was disclosed were the only transcripts that had anything to do with the case on trial.[21]

It was obvious from one of the carefully excised portions of Heath's grand jury testimony that he had testified to additional comments supposedly made by this Petitioner during the all-important meeting at the Commodore in New York on October 17, 1962. Counsel for Petitioner and Liberty Loan Corporation demanded the excised portions, and the court so ordered, despite the fact that the Commonwealth represented that those portions dealt with other crimes unrelated to the 1962 rate board conspiracy. The missing portions were supplied *only* to this Petitioner and Liberty. From this additional grand jury testimony it appeared that at the very same Commodore meeting in New York at which Heath had testified at trial that Petitioner made a statement which the court ruled was an agreement to enter a conspiracy to bribe Hanley, Heath had previously told the grand jury that Petitioner had angrily refused to pay any money to Hanley! The prosecution then warned counsel for Petitioner and Liberty that if they cross-

[21] I Tr. 3359-3403, 3462-3506, 3617-3622; R. 4631. The Commonwealth specifically recognized its obligation to "obey the mandate of ... Brady ...." (P.T. Tr. 224), and the judge admonished the Commonwealth of the consequences of non-disclosure. (I Tr. 3502).

examined Heath regarding these apparently exculpatory portions of his grand jury testimony, it would result in evidence being brought out of other crimes of theirs. Counsel knew that there was one other indictment then outstanding against their clients which also charged them with a conspiracy to bribe Hanley on another matter allegedly also entered into at the Commodore meeting. None of Heath's grand jury testimony regarding that indictment had then been supplied to counsel. Because of the Commonwealth's warning counsel, of course, decided that they dare not cross-examine Heath about his apparently exculpatory grand jury testimony.

At the subsequent, so-called, "Second Small Loans Case" trial of that remaining conspiracy indictment against Petitioner and Liberty, Heath testified substantially in accordance with his previous apparently exculpatory grand jury testimony: that rather than join a conspiracy to bribe Hanley at the Commodore meeting, Petitioner had angrily refused to pay any money to Hanley. No other incriminating evidence was introduced, and after six months of trial Petitioner and Liberty obtained directed verdicts. All the other defendants convicted in the first trial went on to be convicted in the second.

At the hearing on the motion for new trial which alleged a denial of due process occurred when the Commonwealth misrepresented to Petitioner and Liberty the consequences of cross-examining Heath on the apparently exculpatory grand jury testimony, the prosecutor testified that the other criminality he had had in mind dealt not with the remaining indictment on which Petitioner and Liberty were subsequently acquitted, but a *third* conspiracy to bribe Hanley. That provided the court below sufficient basis to find that no misrepresentation had been made, undeterred by the fact that Petitioner and Liberty were never indicted on that third conspiracy (other petitioners were) and, further, that

no evidence of Petitioner's or Liberty's criminality came to light at the second trial when the exculpatory evidence was fully examined into![22]

During the second trial defense counsel were provided additional portions of Heath's grand jury and Crime Commission testimony which they were not given at the first trial, and learned for the first time that at Heath's last appearance before the grand jury, only seven months before trial, he did not name Petitioner as even being present at the Commodore meeting in New York, much less have him say anything. Counsel also learned of Heath's recounting a 1957 conversation with Petitioner in which he said Petitioner told him that if Hanley did not take proper action on legitimate business requests of Liberty that legal action would be taken against Hanley, and that Heath as Hanley's friend might thereby be harmed. Heath at the time of his testimony, seven years later, felt that this was an attempt by Petitioner to "blackmail" him. Heath also inadvertently disclosed in testimony, and counsel then obtained, Heath's expense vouchers covering the time of the conspiratorial meetings he had testified about at the first trial. The very detailed vouchers contradict the fact that any of the incriminating Boston meetings took place. The prosecutor testified at the hearing on the motion for new trial that he had made "a conscious, intentional decision not to produce this evidence." Heath testified that he was "promised that expense vouchers would not be used in this case."

Petitioner and Liberty argued to the trial court and to the Supreme Judicial Court that the suppression of the vouchers, the two portions of grand jury testimony, and the misrepresentation of the consequences of cross-exam-

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[22] It is patent that the misrepresentation was made not out of the prosecutor's solicitude for Petitioner or Liberty, but to obviate the mistrial which would have resulted when evidence of the *other* defendants' criminality came out—yet another facet of the severance argument advanced herein.

ining on the apparently exculpatory testimony all violated the fundamental right to due process of law, citing *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Beyond argument, it was proven that there was a "suppression by the prosecution" "of evidence favorable" to Petitioner, for which there had been a "request," "irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, *supra*, at 87. The only possible question, argued Petitioner, was whether under the *Brady* rule the suppressions were "material."

Strangely, complaining of "this unsettled state of the law," the court below, in one of the more oblique portions of its opinion, held that the suppressions were not "material" and, therefore, there had been no denial of due process. Petitioner submits that this was error, and that any one of the suppressions objected to was a denial of due process in the light of the evidence adduced against him. Recall that Petitioner's guilt turned fragilely on a single sentence Heath alone ascribed to him. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." *Napue* v. *Illinois*, *supra*, at 269; *See*, *Giglio* v. *United States*, —— U.S. ——, ——, 92 S. Ct. 763, 766 (1972). ". . .[T]he smallest feather of a palpable exaggeration or an inconsistency in a witness' statement on a minor point may be the very item to tip the scales and discredit the witness on his main testimony." *Commonwealth* v. *Smith*, 417 Pa. 321, 208 A.2d 219, 225-226 (1965). These suppressions, given the evidence, were hardly feathers.

Had counsel not been warned off by the prosecution in a situation where it would have been madness to ignore the warning, the jury would have been able to consider whether it was likely that Petitioner would have agreed to bribe Hanley one moment and angrily refuse the next. His

open antagonism toward Hanley would indicate no desire to "influence" Hanley in any way. This argument would have also been substantially supported had the testimony of the "blackmail" incident been known, with Petitioner's threat that if Hanley did not act properly, Liberty was "going to taken Hanley to court." All strong evidence contrary to any disposition of Petitioner or Liberty to bribe Hanley and suggesting that the statement Heath attributed to Petitioner, if made by anyone, had not been made by him. Further support would have been provided had Heath's grand jury testimony only seven months before trial not been suppressed: how reliable was Heath's trial testimony when before the grand jury he had not even named Petitioner as one of those at the Commodore meeting, let alone ascribe to him the one incriminating sentence adduced at trial. The "blackmail" incident, proof of a grudge Heath bore for seven years, would have provided reason to influence his memory and put Petitioner in the crime with the one sentence. Evidence of that incident would have been of further value: to contradict Heath's trial testimony that all the individual defendants were his friends and that he was on "cordial terms" with Liberty personnel. Finally, the suppressed expense vouchers would have severely impeached Heath's credibility on several incriminating meetings he testified about. While testimony of those meetings was not introduced against Petitioner or Liberty, even if the jury somehow recalled those restrictions, *any* evidence which affected Heath's credibility would clearly and fundamentally have benefited Petitioner.

It is incomprehensible how the court below could have avoided recognizing this fundamental constitutional error by characterizing this suppressed evidence as "marginally useful," "not material," "of only minor importance," or Petitioner's argument "the idle luxury of hindsight."

4. It Was A Denial Of Due Process Of Law To Consider Evidence Not Admitted Against Petitioner To Uphold His Conviction.

The sole evidence concerning this Petitioner was that of the meeting at the Hotel Commodore on October 17, 1962. It is clear from that meeting that insofar as there was any agreement, it was an inchoate agreement that each participant would present the issue to his home office for approval. The court below recognized that "[i]t could hardly be expected that any of the individual defendants would conspire to pay, or would pay, the substantial amount of money here involved ... out of his own pocket.... [T]he disbursal of such an amount of money would come from the corporate treasury." (Appendix A, p. A-81.)

Heath testified that at that meeting he had no authority to enter into such an agreement on behalf of American, and that he had never had such authority in his 38 years with American, even during the period when he was an executive vice president, since he was always in the "lower echelon." (I Tr. 5464-5465, 4603, 4604, 4732, 4793.) He testified that Godshall of Family and Thomasch of State specifically stated that they would have to report back to their companies. (I Tr. 3774-3775.) He testified that neither Pratt nor Glynn had authority to commit their companies (Household and Beneficial). (I Tr. 4603-4604). He testified that Farrell stated that he would contact other companies about the matter. There was no testimony *aliunde* against Woodcock concerning the authority of Farrell and Barber, the only other men at the meeting, except Heath's testimony that those in his position were not in the upper echelons where the commitments must be made.[23] (I Tr. 4564-4565, 4603-4604, 4732, 4793).

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[23] There was testimony, not admitted against Woodcock, concerning the higher officials of Household, who were not at the meeting.

The court below, in discussing this issue (Appendix A, page A-57), referred to the portions of its opinion dealing with corporate liability to establish individual authority. But that approach was not properly applicable to this question, since the evidence on which those findings were based was never admitted against Woodcock at any stage of the trial.[24] It has always been the clear rule in Massachusetts, as elsewhere, that only evidence admitted against Woodcock can be considered against him. *Commonwealth* v. *Kurth*, 1971 Mass. Adv. Sh. 1117, 1118, 1123-1124, 271 N.E. 2d 349, 350, 353; *Commonwealth* v. *Stasiun*, 349 Mass. 38, 206 N.E. 2d 672. Considering evidence not admitted against Woodcock to support a denial of a motion for directed verdict must be considered a denial of due process of law, as it violates the essence of fairness.[25]

It is irrelevant to this argument whether there was sufficient evidence of Woodcock's authority to enter into a conspiracy.[26] Assuming there was, there must also be evidence admitted against Woodcock that showed that at least one of the other men at the meeting had authority. There was none. Therefore, there was no evidence of conspiracy, and Woodcock could not be convicted in accordance with due process of law. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624.

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[24] See Appendix A, pages A-35 to A-42, notes 12 to 30.

[25] This was argued to the court below in a petition for rehearing which was denied. (Appendices F, G.)

[26] There was abundant evidence of subsequent acts and statements of some of the codefendants that showed that they and their companies did ultimatly consummate the conspiracy. But there is not one word of testimony concerning acts or statements of Woodcock or anyone else from Liberty. It is entirely consistent with the evidence that Woodcock reported the discussion to the president and the board of directors of Liberty, and the decision was made that Liberty would not participate. Indeed, no other conclusion could be reached, given the presumption of innocence coupled with the complete lack of subsequent involvement. (There could have been no prior authorization, since the original purposes of the meeting were entirly proper.)

5. The Court Below Improperly Applied Ex Post Facto A Statute That Was Passed More Than A Year After The Trial Had Been Completed In Order To Affirm Petitioner's Bribery Conviction.

Petitioner was convicted on Indictment No. 12032, which charged that he was a principal to the offense of bribery, which is a felony in Massachusetts.[27] Prior to 1968, a defendant in Massachusetts who was charged as a principal to a felony could not have been convicted on evidence that proved him to have been an accessory before the fact. *E.g., Commonwealth* v. *DiStasio,* 297 Mass. 347, 356-358, 8 N.E. 2d 923, 929. In 1968, Mass. G.L. (Ter. Ed.) c. 274, §2, was amended to read:

> "Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal."

The new statute makes applicable to felony cases a rule that before 1968 was applicable only to misdemeanors. *Commonwealth* v. *Park,* 1 Gray (67 Mass.) 553, 554.

In *Commonwealth* v. *Benjamin,* 1971 Mass. Adv. Sh. 141, 146-149, 266 N.E. 2d 662, 667-668, the Supreme Judicial Court held that the new statute applied retroactively to felonies committed prior to the passage of the statute. That case arose on the Government's appeal from dismissals of indictments before any trial had been held.

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[27] The substantive indictment, No. 12032, charged Petitioner with a felony, in violation of Mass. G.L. (Ter. Ed.) c. 268, §7 (repealed by St. 1962, c. 779, §3, effective May 1, 1963. The alleged bribe was offered prior to May 1, 1963.) Mass. G.L. (Ter. Ed.) c. 274, §1, reads: "A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors." Petitioner was sentenced to serve three years in the state prison on this indictment.

Petitioner's trial was completed in December of 1966, more than a year before the statute was passed, yet the opinion of the court below can only be read as imposing the new statute retroactively. This petition raises the question whether the imposition of the new statute retroactively, not only to the date of the alleged offense but even to a completed trial, is a violation of the prohibition against *ex post facto* laws. Constitution of the United States, Art. 1, §9, cl. 3; Art. 1, §10, cl. 1.

There was no evidence in this case that Woodcock, or any one else in any way connected with Liberty, did or said anything whatsoever prior or subsequent to the alleged formation of the conspiracy at the October 1962 meeting at the Hotel Commodore. The court below, however, held that the evidence "shows that the defendants specifically delegated to one of the co-conspirators, namely Barber, the authority to offer a bribe to Hanley. One may be convicted as a principal where he delegates to an agent the authority to do the act. See *Commonwealth* v. *Dolan*, [sic] 304 Mass. 325, 339."[28]

Under the law as it was prior to the amendment, there was no distinction between principals and accessories before the fact where *misdemeanors* were concerned. *Dolan* v. *Commonwealth*, 304 Mass. 325, 339, 23 N.E. 2d 904, cited by the court below, concerned a misdemeanor. The case relied on in *Dolan* is *Commonwealth* v. *Park*, 1 Gray (67 Mass.) 553, 554, where the court said: "But it is a general rule, in civil actions and in prosecutions for *misdemeanors*, that when a declaration or indictment alleges that a person did an act, such allegation is sustained by proof that he caused it to be done by another." (Emphasis added.) The *Park* case concerned a conviction for a misdemeanor for an unlawful act of an agent.

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[28] Appendix A, page A-136. The correct citation is *Dolan* v. *Commonwealth*, 304 Mass. 325, 339, 23 N.E. 2d 904, 913.

The court below, in relying on the *Dolan* case, demonstrated that it was applying the rule for misdemeanors, now applied to felonies by the new statute, to this case *ex post facto*.

That this new rule was applied here is manifest by numerous cases, which hold that one who procures a guilty agent to commit a felony, but does not himself participate in the criminal act, is an accessory before the fact. Chief among them is *Commonwealth* v. *French*, 1970 Mass. Adv. Sh. 619, 259 N.E. 2d 195. There the court found one Limone guilty as an accessory before the fact to a murder on evidence showing that he initiated the murder and hired one Baron (also a co-conspirator) to commit it. Certainly, Baron was as much an agent of Limone as was Barber an agent of Woodcock.

In *Commonwealth* v. *Doherty*, 353 Mass. 197, 203-205, 229 N.E. 2d 267, the court held that the defendant could have been found to have procured the murder directly, requesting the murderer to come to the scene with his gun, and at the scene pointing out the intended victim to the murderer. He was held as an accessory before the fact.

Here, the court below held that Woodcock made Barber his agent to carry out the offense. If that is true, then Woodcock could not have been found to have been a principal prior to the passage of the 1968 statute.

In the *Benjamin* case, the court below held "that the 1968 statute made only procedural changes . . . ." 1971 Mass. Adv. Sh. at 148, 266 N.E. 2d at 668. But in *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Mr. Justice Chase stated that one of the four categories of violations of the *ex post facto* clause includes,

> "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law re-

quired at the time of the commission of the offense, in order to convict the offender."

There is no question here but that the evidence required to convict Petitioner as a principal is very different from that required to convict him as an accessory before the fact. This was a patent violation of the prohibition against *ex post facto* laws.[29]

The error in this case is made even more egregious by the fact that the new statute was applied to a case that had been completed so long before the statute was passed. Counsel at trial had no way of anticipating the change, and, of course, defended the case in reliance upon the law as it then stood. They argued the point in motions for directed verdict, requests for instructions to the jury, exceptions to the instructions given, assignments of error, and on appeal. The Commonwealth never even suggested that the new statute should apply to this case. Totally surprised by the result, Petitioner sought a rehearing on this issue, which the court below denied. (Appendices F, G.) Even if the statute could be held validly retroactive to cases not yet tried, such as *Commonwealth* v. *Benjamin, supra*, it must be a denial of due process to apply it to a case in which the trial had been completed.

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[29] In this case there was no evidence that would make Petitioner even an accessory before the fact. The law has been that a co-conspirator cannot be convicted of a substantive crime committed by another co-conspirator, unless the evidence showed at least some direct participation in the commission of the actual offense. *Commonwealth* v. *Perry*, 1970 Mass. Adv. Sh. 389, 256 N.E.2d 745; *Commonwealth* v. *Stasiun*, 349 Mass. 38, 47-49; 206 N.E. 2d 672, 678-679; *Commonwealth* v. *DiStasio*, 297 Mass. 347, 8 N.E.2d 923. In the *Perry* case, the court held that one who conspired with others to rob a liquor store, who went with them, and who waited about 400 feet from the scene of the robbery as planned, could not be found guilty either as a principal or as an accessory before the fact to the robbery. It is impossible to distinguish that case from our case.

CONCLUSION

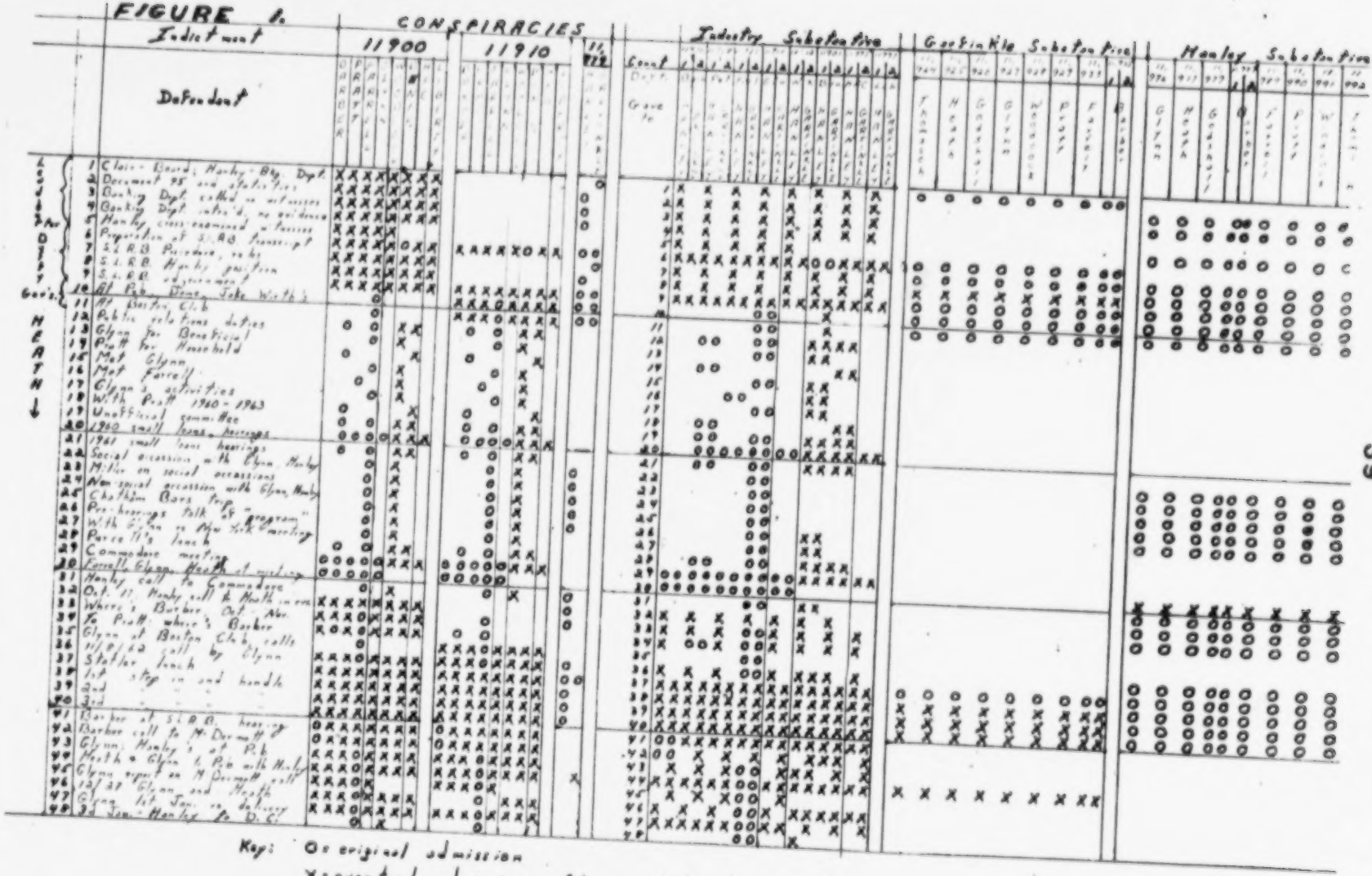
For the reasons set forth above a writ of certiorari should issue to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

DANIEL KLUBOCK
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108
Attorney for Petitioner

ROBERT V. MULKERN
FUSARO & FUSARO
332 Main Street
Worcester, Massachusetts 01608
DANIEL F. FEATHERSTON, JR.
FEATHERSTON, HOMANS & KLUBOCK
45 School Street
Boston, Massachusetts 02108
Of Counsel

FIGURE 1.


Indictment
Defendant
CONSPIRACIES
11900
11910
Industry Sabotage
Gambling Sabotage
Hanley Sabotage
Count
Date
Grave
Key: O = original admission
X = eventual admission after removal of limitations